No. 89-1413

In the Supreme Court of the United States

OCTOBER TERM, 1989

DONACIANO HERNANDEZ-ESCARSEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether petitioner is entitled to a new trial because one juror believed she was sent a "sign from God" that a second juror would change his vote from not guilty to guilty.

2. Whether the district court's failure to instruct the jury that it had to agree unanimously on the drug offenses constituting a continuing criminal enterprise was reversible error.

3. Whether a 1984 amendment to the drug criminal forfeiture statute, 21 U.S.C. 853(d), establishes a preponderance of the evidence standard.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

Statutes and rule—Continued: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1413

DONACIANO HERNANDEZ-ESCARSEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A5-A50) is reported at 886 F.2d 1560.

JURISDICTION

The judgment of the court of appeals was entered on October 4, 1989. A petition for rehearing was denied on January 5, 1990. Pet. App. A51. The petition for a writ of certiorari was filed on March 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was con-

victed of conspiracy to import marijuana, in violation of 21 U.S.C. 963; conspiracy to possess marijuana with intent to distribute it, in violation of 21 U.S.C. 846; conspiracy to travel in interstate and foreign commerce in aid of a racketeering enterprise, in violation of 18 U.S.C. 371 and 1952(a)(3); and engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848. Petitioner was sentenced to 40 years' imprisonment on the CCE count and was ordered to forfeit various properties. On the conspiracy counts, petitioner was sentenced to concurrent terms of 5, 15, and 5 years' imprisonment and was fined $100,000.

1. The evidence at trial showed that petitioner was the kingpin of a large-scale scheme to smuggle marijuana into the United States from Mexico.[1] On four occasions, petitioner arranged for pilots to fly to Mexico to pick up shipments of marijuana. The marijuana was stored in two warehouses in California prior to distribution. On a fifth occasion, petitioner arranged a marijuana shipment within the United States.

Frank Peacock and Robert Meyer flew to Mexico in October 1983 to pick up the first shipment of marijuana for petitioner. Peacock and Meyer landed at the wrong airport, however, and were arrested by Mexican police. Petitioner paid $1 million to the Mexican police to obtain the release of the two men and the plane. Peacock and Meyer then flew back to California and crash-landed in a desert area. Gov't C.A. Br. 3-4.

Peacock hired James Wheaton to assist in transporting the second shipment of marijuana. After discussing the shipment with petitioner, Peacock flew a plane loaded with 900 pounds of marijuana from Mexico to a desert landing strip

---

[1] The opinion of the court of appeals does not contain a complete summary of the evidence at trial. This statement of facts is based on the government's brief filed in the court of appeals.

near Danby, California. The marijuana was loaded into a van owned by Peacock and driven by Wheaton to a Long Beach, California parking lot. Gov't C.A. Br. 4.

In December 1983, Peacock and a second pilot, Michael English, flew two separate planes to Caborca, Mexico, where a Mexican ground crew loaded 1,500 pounds of marijuana into Peacock's plane. Peacock and English flew back and landed near Danby. After the marijuana was loaded into his van, James Powell drove to a stash house, where the marijuana was unloaded into a garage. Later that night, petitioner paid Powell $3,000 cash. Gov't C.A. Br. 5-6.

The next day, English flew back to Caborca, Mexico, to pick up the fourth shipment of marijuana. Petitioner's cousin loaded 1,200 pounds of marijuana onto the plane in Caborca. English then flew to the landing strip near Danby, where he nearly crashed into some nearby oil tanks when one of the plane's engines malfunctioned. After loading the marijuana into Powell's van, English and Powell poured gasoline inside the disabled aircraft and burned it. Powell and English subsequently turned the van over to two men for delivery to a stash house. Gov't C.A. Br. 6-7. Petitioner, who had been occupied during the day in receiving a shipment of bullet-proof vests, later made cash payments of $20,000 to English and $3,000 to Powell. Gov't C.A. Br. 7-8.

Petitioner's fifth shipment was seized by police officers in March 1984 after police in a surveillance aircraft saw Peacock's plane land at the desert strip near Danby, where it was met by a van. Police officers stopped the van and found 1,300 pounds of marijuana inside it. Petitioner later told one of his distributors that the police had confiscated a load of marijuana and one of his planes in March. Gov't C.A. Br. 8-9 & nn.7, 8.

2. The CCE count of the indictment listed 11 felony offenses as constituting the "continuing series of violations" element of the CCE offense. The first felony listed was the

conspiracy to import marijuana charged in Count 1, and the second was the conspiracy to possess marijuana charged in Count 2. The next eight felony offenses alleged were paired substantive offenses of importing and possessing marijuana that corresponded to the four marijuana shipments from Mexico. The final felony listed was the substantive offense of possessing marijuana that corresponded to the fifth shipment seized by the police officers on March 4, 1984. Pet. App. A27-A29. At trial, petitioner asked the district court to give a jury instruction specifically requiring the jury to agree unanimously on the three or more felony offenses constituting the "continuing series of violations" necessary to convict on the CCE count. The district court declined to give the requested instruction. *Id.* at A27.

3. The CCE count also charged that various properties were subject to forfeiture. The district court instructed the jury that, if it found petitioner guilty on the CCE count, it was required to determine which properties were subject to forfeiture. The court further instructed the jury that a property was subject to forfeiture "if the Government proves by a preponderance of the evidence that the property was acquired by the defendant while he engaged in the continuing criminal enterprise * * *, or within a reasonable time after, and with money or proceeds obtained directly or indirectly from the continuing criminal enterprise with no other likely source for obtaining such property." Pet. App. A36-A37.

4. After the jury returned its verdict, petitioner moved for an evidentiary hearing and for a new trial based on an affidavit from Audrey Giles, one of the jurors. Giles' affidavit stated that, while sharing an elevator with juror Grantham on the final morning of jury deliberations, Giles heard Grantham comment that she hoped an unnamed juror would wear his blue blazer that day. At the time, Giles did

not know what Grantham meant by this statement. After the jury returned its verdict, however, Giles accompanied several other jurors to a restaurant. There, juror Casillas told Giles (1) that one of the other jurors had prayed to God that another juror, Walter Geudtner, would change his vote from not guilty to guilty; (2) that the juror had asked for and received a sign from God that her prayers had been heard and that Geudtner would change his vote; and (3) that the sign would be that Geudtner would be wearing his blue blazer to court that day. Pet. App. A43; Pet. 4 n.3. The district court denied the motions. Pet. App. A43.

5. The court of appeals affirmed in part and remanded for vacation of the convictions on two of the counts. Pet. App. A5-A50.[2] While observing that it would have been "the better practice" to give a specific unanimity instruction, the court concluded that "the facts support the conclusion that the jury unanimously agreed on three predicate offenses," and therefore held that the failure to give an instruction requiring the jury to agree unanimously on the three felony offenses underlying the CCE conviction was, at most, harmless error. *Id.* at A28-A29. Observing that petitioner had been separately convicted of the conspiracy to import marijuana and the conspiracy to possess marijuana that were listed as the first two predicate offenses in the CCE count, the court stated that the only question was "whether the jury unanimously agreed on at least a third violation." *Id.* at A28. "In the context of this case," the court explained, "it is inconceivable that the jurors would not have found that the[ ] substantive offenses [listed as predicate felonies in the CCE count] were not committed" because "[t]he co-conspirators involved testified in detail as to these events

[2] The court held that the imposition of concurrent sentences for the two drug conspiracy counts and the CCE count violated the Double Jeopardy Clause. Pet. App. A49-A50. Accordingly, the court remanded the case for vacation of the two drug conspiracy convictions. *Id.* at A50.

and the evidence was overwhelming." *Id.* at A29. The court noted that "[w]ith [petitioner's] conviction of the two conspiracies, all of the substantive offenses committed by his co-conspirators could be attributed to [petitioner]." *Ibid.* "Under these circumstances," the court concluded, "the jurors' unanimous agreement that [petitioner] committed at least three violations of the federal narcotics law cannot seriously be questioned." *Ibid.*

Relying on *United States* v. *Sandini*, 816 F.2d 869 (3d Cir. 1987), the court of appeals held that the jury was properly instructed to apply the preponderance of the evidence standard of proof to determine whether the properties listed in the CCE count were subject to forfeiture. Pet. App. A37-A39. The court noted that proof beyond a reasonable doubt was not constitutionally mandated because "[t]he wording of [21 U.S.C.] 853(a) itself makes clear that forfeiture is a part of the punishment and not an element of the crime." *Id.* at A38. Rejecting petitioner's argument that Section 853(d) does not prescribe a burden of proof because it is phrased in terms of a rebuttable presumption, the court observed that "[i]t would make little sense * * * to provide for a rebuttable presumption that certain property is subject to forfeiture if facts relative to that property are established by a preponderance of the evidence, then move to a beyond-the-reasonable-doubt standard before the property could be forfeited." Pet. App. A39.[3] The court

[3] 21 U.S.C. 853(d) provides:

> There is a rebuttable presumption at trial that any property of a person convicted of a felony under this subchapter or subchapter II of this chapter is subject to forfeiture under this section if the United States establishes by a preponderance of the evidence that –
>
> (1) such property was acquired by such person during the period of the violation of this subchapter or subchapter II of this chapter or within a reasonable time after such period; and
>
> (2) there was no likely source for such property other than the violation of this subchapter or subchapter II of this chapter.

explained that "[i]f the presumption is to mean anything, it must mean that if the presumption is not rebutted, then the forfeiture is established." *Ibid.*

The court of appeals rejected petitioner's claim that he was entitled to a new trial because the jury was improperly influenced by the "sign from God." Pet. App. A42-A44. It observed that "[a]ll that has been alleged is that one of the jurors used prayer and a belief in a sign from God as part of her mental process." *Id.* at A44. The court added that "[n]othing in the declaration indicates that any of the other jurors were told or became aware that a sign from God would be manifested in one juror's wearing a blue blazer while they were still deliberating." The court thus concluded that an evidentiary hearing was unnecessary because "the affidavit does not establish that the verdict was improperly influenced by an extrinsic matter." *Ibid.* The court of appeals also rejected numerous additional contentions that petitioner has now abandoned. *Id.* at A10-A27, A29-A36, A41-A42, A44-A49.

ARGUMENT

1. Petitioner presses his contention that he is entitled to a new trial because the jury's verdict was improperly influenced by consideration of a "sign from God." Pet. 4-9. The lower courts properly rejected this contention.

In *Tanner* v. *United States*, 483 U.S. 107, 116-122 (1987), the Court reaffirmed the general rule that a juror's testimony is not admissible to impeach the jury's verdict. See also *McDonald* v. *Pless*, 238 U.S. 264, 267-269 (1915); *Hyde* v. *United States*, 225 U.S. 347, 384 (1912). The rule against impeachment of jury verdicts protects "the weighty government interest in insulating the jury's deliberative process." 483 U.S. at 120. The Court in *Tanner* also reaffirmed a limited exception to the rule that applies when an external

influence is alleged to have affected the jury. *Id.* at 117-118. The Court has applied this exception in cases involving a bailiff's comment to the jury that the defendant is guilty, *Parker* v. *Gladden*, 385 U.S. 363, 363-364 (1966), a bailiff's statement that the defendant in a murder case had committed other murders, *Mattox* v. *United States*, 146 U.S. 140, 150-151 (1892), and the offer of a bribe to a juror, *Remmer* v. *United States*, 347 U.S. 227, 228-230 (1954). Both the general rule against impeachment of a jury verdict by juror testimony and the exception for external influences are reflected in Fed. R. Evid. 606(b). The Rule provides that "a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict * * * or concerning the juror's mental processes in connection therewith * * *." As an exception to that principle, however, the Rule further provides that post-verdict juror testimony is permissible to determine "whether any outside influence was improperly brought to bear upon any juror."

There is no merit in petitioner's novel contention (Pet. 6-9) that the "sign from God" to juror Grantham was an improper external influence falling within the limited exception of Rule 606(b) and *Tanner*. Despite petitioner's assertions (Pet. 7-8), the purported sign from God was not the "functional equivalent of a statement by a third party that petitioner was guilty of the crimes charged." First, juror Grantham did not ask for a sign of petitioner's guilt, and did not interpret the wearing of a blue blazer as a sign of guilt. Grantham simply prayed that another juror would change his vote to guilty, and apparently believed that she had received a sign that the juror would do so. Second, an event that a juror takes to be a sign from God is not the "functional equivalent of a statement by a third party." Prayer during jury deliberations, the determination whether

an event is a "sign" from God in answer to prayer, the ascription of meaning to such a sign, and the decision whether and how to respond to the sign, all depend entirely upon the individual juror's beliefs, attitudes, and internal mental processes. For that reason, a purported sign from God is not at all like a statement by the court bailiff. Accordingly, the court of appeals correctly held that juror testimony impeaching the verdict is inadmissible in this case.

2. Petitioner also disputes the conclusion of the court of appeals that it was at most harmless error not to instruct the jury that it had to agree unanimously on the offenses that constituted the continuing series of violations underlying the CCE count. Pet. 9-14. This fact-bound contention is without merit.

The continuing criminal enterprise statute, 21 U.S.C. 848, requires the jury to find, among other things, that a defendant has committed a felony violation of Title 21 and that "such violation is a part of a continuing series of violations" of Title 21. 21 U.S.C. 848(b)(1) and (2). Although the requirement of a "continuing series of violations" is not further defined in the statute, the courts have held that it is met by a showing of three or more felony violations of the narcotics laws. See, *e.g.*, *United States* v. *Young*, 745 F.2d 733, 747 (2d Cir. 1984), cert. denied, 470 U.S. 1084 (1985); *United States* v. *Chagra*, 653 F.2d 26, 27-28 (1st Cir. 1981), cert. denied, 455 U.S. 907 (1982).

As an initial matter, we submit that the district court was not required to give a specific unanimity instruction with respect to the offenses constituting the continuing series of violations. There is no requirement of jury unanimity "as to 'specific fact[s] underlying an element' " of the crime. *United States* v. *Jackson*, 879 F.2d 85, 87 (3d Cir. 1989) (quoting *United States* v. *Tarvers*, 833 F.2d 1068, 1074 (1st Cir. 1987)). If jurors were required to be of one mind as to the evidentiary basis for their verdict, "there would be

no principled reason not to require [a specific unanimity] instruction as to virtually every element in any conspiracy count, including the identities of co-conspirators and the overt acts." *Jackson*, 879 F.2d at 88. Accordingly, courts of appeals uniformly hold that the jury need not agree on the identities of the five or more persons supervised by the kingpin of a CCE. See *Jackson*, 879 F.2d at 86-90; *Tarvers*, 833 F.2d at 1073-1075; *United States* v. *Markowski*, 772 F.2d 358, 364 (7th Cir. 1985), cert. denied, 475 U.S. 1018 (1986). The same principles should apply to the "continuing series of violations" element of the CCE offense.[4]

Even if unanimity is required as to the crimes constituting the continuing series of violations, there was no reversible error here. The court of appeals concluded that the failure to give a specific unanimity instruction with respect to the continuing series of violations was harmless in this case because "the facts support the conclusion that the jury unanimously agreed on three predicate acts." Pet. App. A28. Petitioner was convicted on two conspiracy counts that were listed as predicate offenses in the CCE count. Thus, as the court of appeals noted, the only question was "whether the jury unanimously agreed on at least a third violation." *Ibid.* Based on its review of the record, the court found it "inconceivable" that the jurors would not have unanimously agreed that all of the other predicate offenses were com-

---

[4] In *Jackson*, the Third Circuit sought to distinguish its decision in *United States* v. *Echeverri*, 854 F.2d 638, 643 (1988), on the ground that agreement on "culpable acts" differs from agreement on "collateral or underlying facts which relate to the manner in which the culpable conduct was undertaken." 879 F.2d at 88. But the CCE statute requires both supervision of five or more persons and a continuing series of violations. There is no principled basis for requiring unanimity as to the facts underlying one element but not the other.

mitted because "[t]he co-conspirators involved testified in detail as to these events and the evidence was overwhelming." *Id.* at A29. Thus, as the court concluded, it "cannot seriously be questioned" that the jurors unanimously agreed on at least three predicate offenses in the circumstances of this case. *Ibid.* Petitioner's fact-bound objections to the court of appeals' evaluation of the record warrant no further review.[5]

3. Finally, petitioner contends that the drug criminal forfeiture statute requires proof beyond a reasonable doubt rather than proof by a preponderance of the evidence. Pet. 14-19. This contention also is without merit.

The Comprehensive Forfeiture Act of 1984, a component of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, §§ 301-317, 98 Stat. 1976, 2040-2057, amended the criminal forfeiture provisions of Title 21 by, among other things, adding 21 U.S.C. 853(d). That Section creates a rebuttable presumption that any property of a person convicted of a felony drug offense is subject to forfeiture if the government establishes "by a preponderance of the evidence" that (1) the property was acquired during the felony or within a reasonable time thereafter, and (2) there was no likely source for the property other than the drug felony.

---

[5] Petitioner incorrectly suggests (Pet. 10-13) that the decision of the court of appeals departs from *United States* v. *Echeverri*, *supra*. The decision in *Echeverri* turned on the court's fact-based determination that "individual jurors reasonably could have disagreed as to which act supported guilt." 854 F.2d at 642 (quoting *United States* v. *Beros*, 833 F.2d 455, 458 (3d Cir. 1987)). A second case cited by petitioner, *United States* v. *Gilley*, 836 F.2d 1206 (9th Cir. 1988), also rests on the fact-specific conclusion that "there [was] a genuine possibility that the jurors were not unanimous as to the conjunction of two of the material [e]lements of the crime." *Id.* at 1212.

Contrary to petitioner's contention, the court of appeals correctly concluded that Section 853(d) prescribes the government's burden of proof in a drug forfeiture proceeding as a preponderance of the evidence. The other courts of appeals that have addressed this issue have reached the same conclusion. *United States* v. *Sandini*, 816 F.2d 869, 875-876 (3d Cir. 1987); *United States* v. *Herrero*, 893 F.2d 1512, 1541-1542 (7th Cir. 1990). The appellate courts agree that "[t]he legislative history makes clear that Congress sought to make the government's burden of proof in criminal forfeitures the same as that in the civil realm." Pet. App. A39 (quoting *Sandini*, 816 F.2d at 876).[6] As the court of appeals noted, "[it] would make little sense * * * to provide for a rebuttable presumption that certain property is subject to forfeiture if facts relative to that property are established

---

[6] The appellate decisions that petitioner relies upon (Pet. 15-16) are inapposite. Two of the cases, *United States* v. *McKeithen*, 822 F.2d 310 (2d Cir. 1987), and *United States* v. *Crozier*, 674 F.2d 1293 (9th Cir. 1982), involved the predecessor drug forfeiture provision, 21 U.S.C. 848(a)(2)(B) (1982), that did not contain a preponderance of the evidence standard. The other two cases, *United States* v. *Cauble*, 706 F.2d 1322 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984), and *United States* v. *Spilotro*, 680 F.2d 612 (9th Cir. 1982), note in passing that a forfeiture under the RICO forfeiture provision, 18 U.S.C. 1963, must be established by proof beyond a reasonable doubt. But the RICO forfeiture provision, like the predecessor to Section 853(d), does not prescribe a preponderance standard. For the same reason, petitioner cannot rely on the government's brief in opposition to the petition for a writ of certiorari in *Cauble*, or on the Department of Justice's RICO manual for federal prosecutors. See Pet. 16 n.20, 19 n.26. *United States* v. *Pryba*, 674 F. Supp. 1518, 1520-1521 (E.D. Va. 1987), also was a RICO forfeiture case. The criticism of *Sandini* by the district court in *Pryba* rests on a misunderstanding of *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979). See Pet. App. A39 n.10. The court of appeals recently affirmed Pryba's conviction and the forfeitures without commenting on the burden of proof issue. *United States* v. *Pryba*, No. 88-5001 (4th Cir. Apr. 9, 1990).

by a preponderance of the evidence, then move to a beyond-the-reasonable doubt standard before the property could be forfeited" because, "[i]f the presumption is to mean anything, it must mean that if the presumption is not rebutted, then the forfeiture is established." Pet. App. A39. In the absence of a conflict among the courts of appeals, further review by this Court is not warranted.[7]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

MAY 1990

---

[7] Petitioner contends (Pet. 19) that retroactive application of the reduced burden of proof to properties acquired before the enactment of Section 853(d) in 1984 violates the Ex Post Facto Clause. Section 853(d) does not impose a criminal penalty for conduct that was lawful when performed, nor does it impose a harsher penalty than existed prior to passage of the amendments. The change in the statute at issue is thus a procedural change of the type that does not violate the Ex Post Facto Clause, even though it may operate to the defendant's detriment. See *Miller* v. *Florida*, 482 U.S. 423, 433 (1987); *Dobbert* v. *Florida*, 432 U.S. 282, 293-294 (1977).

☆ U.S. GOVERNMENT PRINTING OFFICE 1990—262 203/00881